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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-130

JUDY WARD SMITH - - - - - - Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK CORYELL
306 Kentucky Home Life Building
Louisville, Kentucky 40202

LESLIE G. WHITMER, Director
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

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INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 1– 2

Rules Involved 2

Statement of the Case 3– 7

Argument 7–17

I. The Decision Below Was Based on an Adequate and Independent Non-Federal Ground 7–13

II. The Decision Below is Correct and There Are no Justiciable Reasons for Granting the Writ . 13–17

Conclusion 17

Appendix 19–25

Excerpts from Deposition of Petitioner 19

Excerpts from Brief of Petitioner 20

Letter Dated November 18, 1971, from Frank Coryell 22

Motion in Court of Appeals of Kentucky 23–24

Excerpt from Attachment to the Brief in Court of Appeals 25

AUTHORITIES CITED

Cases:

PAGE

Bonar v. *Commonwealth*, 180 Ky. 338, 202 S. W. 676 (1918) 9-10

Diaz v. *United States*, 223 U. S. 442 (1911) 10

In Re Ruffalo, 390 U. S. 544 (1968) 10-11

Kentucky State Bar Ass'n v. *Jansen*, 459 S. W. 2d 141 (1970) 15

Kentucky Bar Association v. *Martin*, 490 S. W. 2d 759 (1973) 15

Kentucky State Bar Association v. *Smith*, 492 S. W. 2d 880 (1973) 1

Kentucky State Bar Ass'n v. *Stivers*, 375 S. W. 2d 900 (1972) 11

Ruffalo v. *Mahoning County Bar Ass'n*, 379 U. S. 931 (1964) 10-11, 15-16

Statutes and Rules of the Court of Appeals of Kentucky:

Kentucky Revised Statutes §431.065 ..... 3, 8

RCA 3.280 ..... 3, 10

RCA 3.360 ..... 9, 10

RCA 3.380 12

RCA 3.390 12

RCA 3.320 14

RCA 3.330 14

Other Authorities:

ABA Report on Disciplinary Enforcement (1970). 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kentucky Court of Appeals (App. pp. 1a-5a of Petition) is reported at 492 S. W. 2d 880.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where an attorney pleads guilty to a lesser criminal offense in a plea bargaining process and voluntarily and deliberately places in the trial record facts on

which the indictments are based, in defense to a charge based on the judgment of conviction of the lesser offense, is the petitioner deprived of due process of law when the final determiner of the facts and imposer of discipline finds the attorney guilty of committing the acts alleged in the indictments?

2. Where an attorney pleads guilty to a lesser criminal offense in a plea bargaining process than those offenses on which she is indicted and voluntarily and deliberately places the grand jury transcript concerning the indictments in the trial record in her own defense, has she waived her right to the confrontation of witnesses and cross-examination of witnesses given by a rule of the Court of Appeals, where the determiner of facts fails to find the facts in the attorney's favor?
3. Were the disciplinary proceedings by the Kentucky State Bar Association and the Court of Appeals of Kentucky conducted in such a manner as to deny petitioner procedural due process of law?
4. Does the evidence support the findings and judgment of the Court of Appeals of Kentucky?

RULES INVOLVED

Kentucky Rules of the Court of Appeals of Kentucky Concerning Procedures in Disciplinary Cases.

The pertinent provisions of Rule 3 of the Court of Appeals of Kentucky are set forth in full in the appendix of the Petition (pp. 8a-23a).

STATEMENT OF THE CASE

During February, 1970, the Perry County, Kentucky, Grand Jury returned three indictments against the petitioner-attorney, charging her with (1) obtaining money under false pretenses, (2) forgery, and (3) removal of court records concerning an estate case she was handling for one Mrs. Sally Fugate, an heir, in the Perry County, Kentucky, Circuit Court. On advice of her retained counsel and her own analysis of her situation, namely, having no evidence to present in her own defense, during a plea bargaining process, petitioner pleaded guilty to a lesser charge of attempting to commit an offense under the laws of the Commonwealth of Kentucky as provided under KRS 431.065 (Petition, p. 2).

On March 29, 1971, respondent filed a disciplinary charge against petitioner stating she had pleaded guilty to attempting to commit an offense under the laws of the Commonwealth and that such facts and actions on the part of petitioner constituted unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute for which she should be disciplined by the Court of Appeals.

Petitioner during her disciplinary hearing (two hearings were necessary because the reporter of the first hearing lost his notes) represented herself with full knowledge of the provisions of RCA 3.280 providing for the appointment of counsel where a respondent is unable to employ counsel and after the trial com-

mittee had reminded her of her right at each hearing to retain counsel together with her other constitutional rights (p. 19). She had employed counsel in her various criminal proceedings. Petitioner was successful over the objection of counsel for the bar association to place in the record her statements concerning the events and acts which led to her indictments, together with documentary evidence. In the course of her defense, petitioner voluntarily and for her own benefit entered the grand jury transcript leading to her indictments into evidence and argued the testimony of grand jury witnesses in her response to the rule to show cause issued by the Court of Appeals (p. 20). The grand jury testimony included only testimony concerning each of the aforesaid three indictments returned against her. Petitioner countered her accuser's testimony before the grand jury with an alleged possible scheme invented by her deceased husband to cause her disbarment. Petitioner at no time called any witnesses to testify at her disciplinary hearing even though she had the right to do so.

During the disciplinary proceeding, petitioner testified that she did not write the check in question and that she had employed a handwriting expert, Maxwell Allen, to examine the check. Petitioner testified at the trial hearing that Mr. Allen said he could not testify one way or the other because of the quality of the paper of the check (p. 19). After a subsequent contract with Mr. Allen, the prosecutor for the bar association discovered that Mr. Allen would testify in con-

tradiction of the statements attributed to him by the petitioner. The prosecutor notified respondent in writing of his desire to take Mr. Allen's deposition before the case was submitted to the trial committee for report informing petitioner as to the probable nature of Mr. Allen's testimony (p. 21). Petitioner agreed to the taking of the deposition and cross-examined Mr. Allen at the deposing (p. 22). Mr. Allen's sworn testimony was that petitioner was informed she had in fact written the check and he reported that he would have to make some very damaging concessions on petitioner's part (App. p. 64a of Petition). The Court of Appeals later found that petitioner had perjured her testimony at the disciplinary hearing as the result of the indicated false testimony.

The trial committee made a report to the Board of Bar Governors recommending a finding that petitioner had prepared the check, endorsed it and paid no part of the proceeds of the check to her client. The trial committee found that respondent had committed the acts leading to her indictment of obtaining money under false pretenses (App. p. 37a of Petition). In addition, the trial committee found that the facts surrounding the misdemeanor to which respondent pleaded guilty was so intertwined and such a violation of a lawyer's high ethical obligations to a client and the client's money and property that the offense clearly involved moral turpitude. The trial committee then listed the mitigating circumstances in the case which did not relate to the facts on which the indictments were based

and recommended a three-year suspension period (App. p. 39a of Petition).

The Board of Bar Governors reviewed the report of the trial committee and the transcript of evidence. On July 14, 1972, the Board entered an order finding respondent guilty as charged and *recommended* to the Court of Appeals of Kentucky that the petitioner be suspended from the practice of law for a period of six months and required to pay the costs of the action (App. p. 40a of Petition). This order was served on petitioner together with a show cause rule from the Court of Appeals.

The Court of Appeals took the case under submission after petitioner answered the rule and after the court sustained petitioner's motion permitting her to file her brief before the trial committee as her brief in the Court of Appeals (pp. 23-24). In this brief anad its attachment, petitioner argued the facts surrounding her indictments and argued vigorously that she should not be disbarred (p. 25).

The Court of Appeals as a sole finder of fact and determiner of the degree of discipline imposed on a Kentucky attorney reviewed the transcript of the disciplinary hearing. From the record built almost solely by the peitioner in her own defense, the court reviewed the evidence. As fact finders, the court found that the evidence voluntarily and deliberately placed in the record by the petitioner showed she had committed the acts leading to her indictments and had committed perjury at her disciplinary hearing. The Court of

Appeals by the weight of the evidence determined that the facts of the case proved by a preponderance of the evidence warranted disbarment (App. p. 17a of Petition). A petition for rehearing was filed by petitioner and denied without comment.

ARGUMENT

The issues raised by the petitioner in her petition for certiorari concern the manner in which a disciplinary proceeding in the Court of Appeals of Kentucky was conducted. It is argued that the manner in which the disciplinary proceeding was conducted resulted in multiple violations of petitioner's due process rights. It is contended that this court should furnish state disciplinary units with guidelines to use in disciplining their lawyers.

Each issue raised by the petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I

The Decision Below Was Based on an Adequate and Independent Non-Federal Ground

Before this court, petitioner has raised primarily three constitutional issues. First, the petitioner has asserted that she has been found guilty of charges not stated in the original charge in violation of her rights to due process. As a matter of fact, no additional charges of any kind were filed against petitioner after the original and only charge was lodged. Petitioner in her planned defense went behind the judgment re-

sulting in her pleading guilty to a lesser charge in a plea bargaining process. In an effort to explain away the acts alleged in the three indictments, she placed in the record the testimony of witnesses before the grand jury which returned the three indictments and argued her innocence of the acts. All the acts were directly related to the judgment entered on a lesser crime. The criminal offense of attempting to commit any offense under the law of the Commonwealth, if not otherwise specifically provided for (KRS 431.065), is a nondescriptive catch-all misdemeanor offense. The Court of Appeals in its disbarment opinion undertook to discuss the case law in the state of Kentucky concerning the testimony permitted where a charge is based on a judgment of conviction. In fact, the court stated:

> "Even thought we have previously held that once an attorney is adjudged guilty of a felony or a misdemeanor involving dishonesty as defined in Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 the Trial Committee and Board of Governors should not consider testimony which reinquires into the issue of guilt, it has not been held that they cannot and should not examine the facts [out of which a plea of guilty is entered.] It is true that if the defendant pleads guilty to a reduced charge he cannot later insist that he was not guilty of the charge for which he was convicted. In Re Rudd, Ky., 221 S. W. 2d 688; In Re Shumate, Ky., 382 S. W. 2d 405; In Re Carroll, Ky., 406 S. W. 2d 845. However, this does not mean that the Board of Trial Committee in its investigative capacity cannot look behind a plea of guilty especially where

plea bargaining is involved in order to determine just what offenses the defendant is or was guilty of."

The court, therefore, rested its decision on the basis of their interpretation of the case law in the state of Kentucky.

The second constitutional issue raised by petitioner concerns the trial committee and the Court of Appeals of Kentucky using evidence in the form of a grand jury transcript where the evidence was placed into the record by her in her own defense. In fact, the facts surrounding the indictments were placed in the record over the express objection of respondent herein. The transcript related solely to the indictments disposed of through a plea bargaining process in the resulting judgment on which the sole disciplinary charge is based. It is contended that the court violated its own rule (RCA 3.360) against admitting such evidence.

On petition for rehearing, respondent herein argued that petitioner voluntarily wavied her right to confrontation and cross-examination of witnesses before the grand jury whose testimony appeared in the transcript. In support of this argument, the case of *Bonar* v. *Commonwealth,* 180 Ky. 338, 202 S. W. 676, 677 (1918), was cited to the court. The Court of Appeals of Kentucky in that case stated:

". . . This alleged vice, as will be seen, consisted in the way and manner in which the facts were developed before the jury. The means by which a tribunal obtains possession of the facts

> when they are contested in the trial of a case is called in the law testimony. For the better protection of litigants, and to avoid impositions being practiced upon the courts, certain rules for the admission of testimony have been prescribed by the law. These rules affording such protection to the litigants may be waived by them, and testimony may be heard contrary to such prescribed rules. If this be done, either by the consent of the litigant or without his objection thereto properly manifested at the time of its introduction, he will be deemed to have waived his right to insist upon a strict enforcement of such rules, and this doctrine of waiver applies also to a defendant in a criminal prosecution, although he may be guaranteed the constitutional right to have the testimony introduced and heard contrary to the way he consented."

The *Bonar* opinion cites the leading United States Supreme Court case on right of waiver of constitutional rights styled, *Diaz* v. *United States,* 223 U. S. 442, 56 L. Ed. 500 (1911). It is clear from the provisions of RCA 3.280 and 3.360 the Kentucky Court of Appeals recognizes and protects the constitutional rights of a respondent discussed by this court in *In Re Ruffalo,* 390 U. S. 544 (1968), and related cases. Such rights are a personal privilege and were expressly waived by petitioner under Kentucky case law. The Court of Appeals of Kentucky in denying petitioner's petition for rehearing without comment has based its decision on independent and substantial non-federal grounds. It will be noted that the state disbarment in the *Ruffalo* case was not before this court. In the state disciplinary

case, this court denied a petition for certiorari. *Ruffalo* v. *Mahoning County Bar Ass'n.*, 379 U. S. 931, 13 L. Ed. 2d 342 (1964).

Regarding the finding of facts and imposing of discipline, the Court of Appeals of Kentucky has clearly defined the duties of trial committees, the Board of Bar Governors and the court. In *Kentucky State Bar Association* v. *Stivers*, 375 S. W. 2d 900, 903, 904 (1972), the Court stated:

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding."
>
> * * * * * * *
>
> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

It is clear that the court did exercise its own judgment by the fact it refused to follow the recommendations of the trial committee or the Board of Bar Governors.

Thirdly, petitioner contends the court's show cause order required her to show cause why she should not be suspended for six months and then the court entered an order disbarring her. It is argued such a procedure is inconsistent with due process. Petitioner was, as a matter of fact, fully aware of the advisory nature of the recommendations made by the trial committees and the Board of Bar Governors. RCA 3.380 provides that the report of a trial committee is advisory. RCA 3.390 provides that any order of the Board recommending to the court that disciplinary action be taken is advisory. In fact, the Board's order served on the petitioner together with the rule to show cause is clearly labeled "Recommendation." Petitioner's brief and attachment thereto in response to the rule to show cause states that unless a misdemeanor is done with deliberate and conscious intent, it seems that such offense should not be grounds for disbarment. Petitioner knew at all stages of the proceeding that regardless of the recommendations of the trial committee and the Board of Bar Governors, she could be disbarred by the Court of Appeals of Kentucky.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There was no federal issue to be decided since the sole basis on which to determine the validity of the petitioner's constitutional argument rested on the proper interpretation of Kentucky law.

The petitioner has requested this court to grant a petition for certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals reveals that the results reached in this case by the Court of Appeals were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals sitting as a fact finder.

II

The Decision Below is Correct and There Are no Justiciable Reasons for Granting the Writ

The Court of Appeals reviewed the facts surrounding the three offenses on which petitioner was indicted to determine the acts, if any, which lead to the plea of guilty to a lesser crime. From the evidence petitioner submitted in her own defense, the court, as the sole finder of fact, determined on a review of the entire record that petitioner had committed acts amounting to the crimes described in her indictment. The court found the facts had been proven by the evidence in the record. The court did not consider other criminal charges brought against petitioner and mentioned in the petitioner's testimony which were not interwoven with her plea of guilty. At every stage of the disciplinary proceeding petitioner argued the facts surrounding her indictments open and freely to explain

her innocence. She now seeks to plan another theory of defense when the final determination of facts was not in her favor.

Petitioner seeks to move this court to set uniform rules for state disciplinary proceedings and cites the American Bar Association's Report on Disciplinary Enforcement (1970) authored by retired Supreme Court Justice Tom C. Clark. A comparison of the model rules for state disciplinary agencies when they were released and Rule 3 of the Court of Appeals in effect at that time, will show that Kentucky had the model structure almost without exception. Amendments to Rule 3 effective July 2, 1971, brought Kentucky in nearly complete compliance with the model including a revision of the rule relating to procedure where an attorney has been convicted of a serious misdemeanor or felony. The new Rule (RCA 3.320) abolishes the old rule under which the case at bar was prosecuted (RCA 3.330). The new rule in line with the recommendations of the Clark report eliminates the vague phrase "offense involving moral turpitude" substituting "serious misdemeanor and felony" for which disbarment is the punishment and provides for a period of suspension when the judgment of conviction is appealed to a higher court. The impact of the Clark report has been felt in every state. There has been a restructuring of disciplinary machinery in most states. Effective guidelines insuring due process in disciplinary proceedings are in existence and proving extremely effective. Action by this court in this area is not needed. State action has proved effective.

It is abundantly clear that petitioner was not found guilty of acts which were not alleged in the original charge. The finding of the Court of Appeals of Kentucky were entirely consistent with and interwoven with the provisions of the charge with the exception of the finding that petitioner had given false testimony at the disciplinary trial hearing. The record before the court clearly supported the court's finding in this respect. It is not believed that this court wishes to venture on a fact-finding mission, therefore, the petition should be denied.

In the case of *Kentucky Bar Association* v. *John David Martin,* 490 S. W. 2d 759 (1973), the Court of Appeals of Kentucky disbarred Mr. Martin when he plead guilty to the criminal offenses of displaying stolen license plates and defrauding an innkeeper by known inability to pay his hotel bill. The punishment of disbarment in petitioner's case is not unreasonable. In the case of *Kentucky State Bar Association* v. *Jansen,* 459 S. W. 2d 141 (1970), the respondent was disbarred for accepting a fee and rendering no service therefor. The punishment is sound and in the public interest. The degree of punishment is clearly in the discretion of the highest state court in Kentucky and not subject to review by this court on a writ of certiorari.

The action of the Court of Appeals of Kentucky was completely consistent with the court's holding in *In Re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1222 (1968). Petitioner was afforded due process as provided in the *Ruffalo* case. In the *Ruffalo* case during the third

day of hearings the Board added a new charge against the respondent over the strong objection of his counsel based on facts completely unrelated to the original charge. This fact situation is not found in the case at bar. No additional charges were leveled against petitioner. The evidence petitioner most strenuously argues should not have been considered by the Court of Appeals of Kentucky was voluntarily and deliberately placed in the transcript of hearing by the petitioner herself.

Petitioner would have this court sit as a fact finder. It is urged that this court review the evidence presented at the disciplinary trial hearing and decide whether or not from certain evidence the petitioner prepared and endorsed the check in question. This fact-finding task is a burden placed on the Court of Appeals of Kentucky by its own rules and does not involve a federal issue to be decided by this court. As a matter of case law in Kentucky, petitioner waived her right to confrontation and cross-examination of the witnesses appearing before the grand jury which indicted her on behavior which would support a finding of three criminal acts in a state criminal proceeding. Petitioner introduced and entered into evidence the testimony of the witnesses.

Petitioner argues that the Court of Appeals of Kentucky has not followed its own rule prohibiting the consideration of a transcript of a grand jury proceeding. The danger here, petitioner states, is where the agency that must decide whether to follow the rule is also the

agency that determines guilt and recommends punishment. The petitioner waived her right to avail herself of the rule of the court which could prevent the review of the transcript of the grand jury proceeding. Petitioner took the risk of placing adverse testimony in the record hoping to overcome the testimony by her own self-serving statements. Her defense failed and she now seeks to relitigate her case on factual issues in this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Respectfully submitted,

FRANK CORYELL
306 Kentucky Home Life Building
Louisville, Kentucky 40202

LESLIE G. WHITMER, Director
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

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